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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 703

JOHN R. STINNETT, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The District Court rendered no opinion. The opinion of the Court of Appeals (R. 78-81) is reported in 173 F. 2d 129.

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1949. (R. 81.) The petition for a writ of certiorari was filed on April 6, 1949. The jurisdiction of this Court is invoked under 28 U.S.C. 1254. See also Rules 37(b)(2) and 45(a) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Whether the Government's evidence relating to petitioner's periodic bank deposits and large expenditures was sufficient to establish the receipt by petitioner of taxable income in addition to that reported in his returns.

2. Whether the jury could properly find a wilful affirmative attempt by the petitioner to evade and defeat his taxes.

3. Whether the trial court properly instructed the jury as to the elements of the crime of wilful evasion or defeat of income taxes.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1946 ed., Sec. 145.)

STATEMENT

The petitioner was indicted in the Eastern District of Virginia for wilfully attempting to evade and defeat a large part of his income tax liabilities for the calendar years 1942, 1943 and 1944 in violation of Section 145(b) of the Internal Revenue Code. (R. 1-4)[1] After a trial by jury the petitioner was convicted on all three counts (R. 47), and was sentenced to serve a period of imprisonment of two years (R. 75). On appeal, the judgment of conviction was affirmed by the Court of Appeals for the Fourth Circuit (R. 81).

The evidence showed that during the period 1937 to 1945, the petitioner operated a second-hand furniture store in Richmond, Virginia. (R. 11, 67-69.)

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[1] The following table based on the three-count indictment shows the amounts by which the petitioner was alleged to have understated his income and tax liability:

Net Income

Year	Per Return	Per Indictment	Difference
1942	$1,574.43	$26,327.71	$24,753.28
1943	2,386.00	21,758.44	19,372.44
1944	2,232.48	32,493.72	30,261.24
Total	$6,192.91	$80,579.87	$74,386.96

Tax

Year	Per Return	Per Indictment	Difference
1942	$ 71.13	$10,041.88	$ 9,970.75
1943	* 125.27	7,844.87	7,719.60
1944	148.00	14,780.92	14,632.92
	$ 344.40	$32,667.67	$32,323.27

* The tax per return for 1943 should have been stated as $179.12.

For the calendar years 1942 to 1944, inclusive, petitioner filed federal income tax returns with the Collector of Internal Revenue at Richmond, Virginia. (R. 54-65.) It is not clear who prepared the 1942 return but the ones for 1943 and 1944 were prepared by other individuals at the solicitation of the petitioner, who supplied the necessary data usually on slips of paper but did not furnish his business records. (R. 7, 72-73.)

A revenue agent of the Bureau of Internal Revenue was assigned to investigate the tax affairs of the petitioner in June of 1945. (R. 10.) After several efforts the revenue agent held an interview with petitioner on September 5, 1945. (R. 71-72.) During this interview the petitioner stated that he had conducted a second-hand furniture business for the past eight or ten years (R. 11); that his wife received no income for the period 1942 to 1944, inclusive; and that he had never received an inheritance. When asked during this same interview whether or not he deposited his business receipts in his bank accounts, the petitioner stated that he did. (R. 12.) Petitioner did not submit to the revenue agent any books of account or business records of any nature during the interview or at any time thereafter. (R. 11.)

Petitioner further stated during the interview with the revenue agent that he maintained as business records three books in which he entered his sales, purchases and cash receipts but that they had been destroyed by the person to whom he sold his

business. (R. 11.) The petitioner sold his furniture business in January, 1945. (R. 5, 12.) The purchaser testified that at the time he bought the petitioner's stock of furniture he did not see any of the petitioner's business records pertaining to the furniture store. (R. 5-6.)

The revenue agent testified that he determined the petitioner's tax liability from an analysis of the bank deposits and the ascertainment of cash disbursements because the petitioner had not at any time furnished the Government with any business records and because the petitioner stated that he had deposited his business receipts. The revenue agent further stated that he had ascertained that the petitioner had been making periodic deposits in his bank accounts. (R. 12-13.)

Petitioner maintained one bank account in 1942, two in 1943 and one in 1944, all in the City of Richmond, Virginia. (R. 13.) The Government introduced in evidence the original deposit tickets and bank ledger sheets of petitioner's bank accounts. Further, the Government introduced cashier's checks purchased by the petitioner during the year 1944 and, finally, photostatic copies of the Government bonds purchased by him during the years 1942 to 1944, inclusive. (Govt. Exs. 4-17.)[2] The contents of all of the aforementioned exhibits were summarized in the testimony of the revenue agent.

With respect to the calendar year 1942, he testified

[2] All of these exhibits have been filed as a part of the record in this case and are available for inspection of the Court.

that the petitioner's bank deposits totaled $46,753.28. The deposits were analyzed in order to determine whether any portion of them represented non-income items such as transfer of funds or loans. The revenue agent testified that no non-income items were reflected in the 1942 deposits. (R. 14.) In addition to the bank deposits, the revenue agent ascertained that the petitioner spent the sum of $11,250 for the purchase of United States Savings Bonds during the year 1942. Of this total, $8,250 in bond purchases were made from funds withdrawn from the bank, and the revenue agent concluded that the remaining $3,000 of the total bond purchases were made with cash not withdrawn from the bank account. (R. 14.) The amounts of the deposits plus the cash used to purchase bonds, totaling $49,753.28, were considered to be the petitioner's gross receipts for the year 1942. (R. 15.) The revenue agent testified that inasmuch as no records of any type were available to show the amounts of the cost of goods sold or deductions for the year the amounts used by the petitioner in his return for 1942, totaling $23,425.57, were considered in the computation of the petitioner's net income. (R. 19.) On this basis it was determined that the petitioner's net income for 1942 was $26,327.71 (R. 22) and that his corrected tax liability was $10,041.88 (R. 24).

For the year 1943, the petitioner's total deposits in his two accounts were $58,178.77. (R. 17.) The sum of $6,000 deposited in one account was not

included in the total since that amount had been transferred from another account. (R. 15.) In addition, the sum of $7,500 was eliminated from the total deposits because it was ascertained that that amount represented the deposited receipts from redeemed United States Savings Bonds. (R. 16.) Therefore, the final figure considered as the petitioner's gross receipts for 1943 was $50,678.77. (R. 17.) In view of the absence of records, the petitioner's cost of goods sold and deductions, totaling $29,003 (R. 19-20), were taken from the return filed for 1943. The petitioner's net income for 1943 was accordingly computed to be the sum of $21,758.77 (R. 22), and his corrected tax liability was $7,844.87 (R. 25).

In the year 1944, the petitioner's bank deposits totaled $14,250.50. The sum of $3,750 was eliminated as a non-income item since it was determined that this amount represented the proceeds of a redeemed bond. It was therefore considered that the sum of $10,455.50 represented that portion of the petitioner's gross receipts reflected by bank deposits. (R. 17-18.) Upon examination of the bank records of the petitioner's account for the year 1944, it was also ascertained that he had purchased cashier's checks in the total amount of $61,150. By checking the bank withdrawals for 1944, it was determined that only one cashier's check for $2,000 had been purchased with funds withdrawn from the bank; the conclusion was therefore drawn that petitioner had purchased cashier's checks in the

total amount of $59,150 with cash not withdrawn from his bank account and that this amount represented a portion of gross receipts. The total of petitioner's gross receipts deposits ($10,455.50) and the cashier's checks ($59,150)—or the sum of $69,605.50—was considered to be the amount of petitioner's gross receipts for 1944. (R. 18.)

As was the case for prior years, in view of the absence of records, the Government accepted the representations in the petitioner's return for 1944 that the total amount of cost of goods sold and deductions was the sum of $30,322, adjusted to compensate for an overstatement of opening inventory in the amount of $2,981. (R. 20-22, 27.) On the basis of the aforementioned determination of gross receipts and deductions, the revenue agent determined that petitioner's net income for 1944 was $39,678.98 (R. 22), and that his corrected tax liability was $19,643.87 (R. 25).

The evidence also revealed that during the years 1942 to 1944, inclusive, the petitioner purchased the following amounts of Government bonds (cost value):

1942	$11,250
1943	7,500
1944	12,730
Total	$31,480

He redeemed Government bonds at the following cost value: 1942—$3,750; 1943—$7,500; 1944—$3,750. (R. 26-27.)

ARGUMENT

The evidence was sufficient to prove that petitioner received substantial net income in addition to the sums reported in his returns, and that he wilfully evaded payment of the tax on this additional unreported income. The court's instructions to the jury were likewise unexceptionable.

1. The Government's proof based upon bank deposits and purchases of United States Savings Bonds and cashier's checks met the necessary requirements to establish additional unreported income. It was proved that taxpayer was in an income producing business (R. 11, 67-69); that he deposited business receipts in his bank accounts (R. 12); that the deposits were periodic (R. 12); that the bank accounts were analyzed to eliminate non-income items and duplications of income items (R. 14, 16-17). *Supra,* pp. 5-8. The jury could therefore properly conclude that the amounts of petitioner's bank deposits reflecting business receipts were a part of his gross receipts for each year involved, and, after elimination of known exemptions and deductions, represented taxable income. *Gleckman* v. *United States,* 80 F. 2d 394 (C. A. 8), certiorari denied, 297 U. S. 709. See also *Oliver* v. *United States,* 54 F. 2d 48 (C. A. 7), certiorari denied, 285 U. S. 543; *United States* v. *Miro,* 60 F. 2d 58, 59 (C. A. 2); *Malone* v. *United States,* 94 F. 2d 281 (C. A. 7), certiorari denied, 304 U. S. 562.

Further, the proof of petitioner's expenditures in each year in amounts far in excess of reported net income for those years (*supra,* pp. 7-8) would alone have warranted the jury's finding that petitioner had additional unreported net income, without reference to the substantial proof of corrected net income which was made on the basis of the large periodic bank deposits. *United States* v. *Johnson,* 319 U. S. 503, rehearing denied, 320 U. S. 808. See also *United States* v. *Skidmore,* 123 F. 2d 604 (C. A. 7), certiorari denied, 315 U. S. 800; *O'Brien* v. *United States,* 51 F. 2d 193 (C. A. 7), certiorari denied, 284 U. S. 673.

2. Petitioner's contention that the Government failed to establish a "wilful commission" or "wilful and positive attempt" to evade payment of the tax results from a patent misconception of this Court's holding in *Spies* v. *United States,* 317 U. S. 492. That case makes it clear that the filing of a false and fraudulent return, with the intent to evade or defeat the tax, constitutes an "attempt" within the meaning of Section 145 (b), *supra. Cave* v. *United States,* 159 F. 2d 464 (C. A. 8), certiorari denied, 331 U. S. 847. The element of wilfulness was, of course, properly inferable from all of the evidence. *Tinkoff* v. *United States,* 86 F. 2d 868 (C. A. 7), certiorari denied, 301 U. S. 689, rehearing denied, 301 U. S. 715.

3. The trial court properly instructed the jury that the offense defined in Section 145(b), *supra,*

is the wilful attempt to evade and defeat a tax and that the amount of the tax evaded is not crucial. *United States* v. *Miro, supra; United States* v. *Simmons,* 96 U. S. 360. Also the court correctly charged that the Government need not prove an evasion of all the tax alleged in the indictment but that it is sufficient if it proved that a substantial portion of the tax was wilfully evaded. *United States* v. *Ragen,* 314 U. S. 513, rehearing denied, 315 U. S. 826. The jury was properly instructed that wilfulness was a requisite element of the proof. (R. 44-45.) *United States* v. *Murdock,* 290 U. S. 389.

Petitioner's objection to the charge on the ground that it assumed he had received income in excess of that reported is baseless. The court made no such statement either directly or by inference. In fact, the court emphasized that the question whether or not the petitioner had received the income alleged in the indictment was a "contention of the Government" and was "a narrow" and "clear-cut" issue in the case. (R. 44.)

Petitioner has also isolated one sentence of the charge from its context and attributed prejudicial error to it (R. 44-45):

> If you believe from the evidence, all the evidence before you, considering all the circumstances and facts known to you, that the defendant received income during these respective years in an amount or amounts greater than the amount which he stated in his return

> as being income, then you shall find him guilty. It is not necessary that the Government prove the precise amount.

As the Court of Appeals pointed out (R. 79-81), this sentence clearly was not intended in itself to be a complete statement of all of the elements of the crime charged. The statement is correct when considered in connection with the immediately following specific instruction that, in order to convict, it would be necessary to find that the petitioner's failure to report a substantial part of his net income was wilful (R. 45, 80-1).

CONCLUSION

The decision below is in all respects correct. No important question of law or conflict of decisions is presented. It is therefore respectfully submitted that the petition should be denied.

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